Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 86-1108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF VERMONT,

Petitioner,

v.

RICK COX,

Respondent.

On Writ of Certiorari to the Supreme Court of Vermont

JOINT APPENDIX

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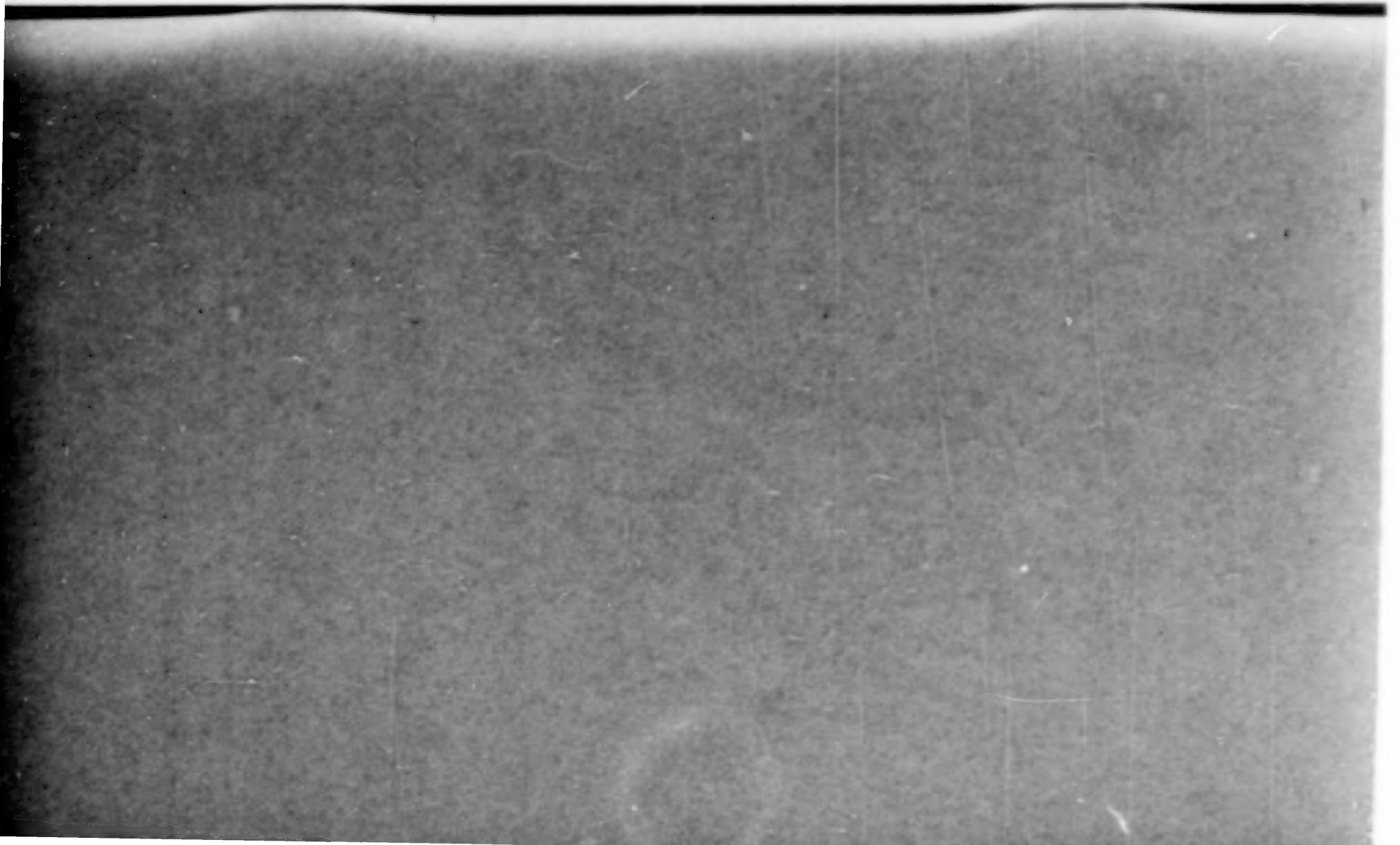
PETITION FOR CERTIORARI FILED ON JANUARY 2, 1987
CERTIORARI GRANTED ON FEBRUARY 23, 1987



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NOTE: The following opinion and orders have not been included in this joint appendix because they appear on the following pages in the Appendix to the printed Petition for Certiorari:

Opinion and Order of the Vermont Supreme Court	1a
Order of the Vermont Supreme Court denying motion to reargue	8a

RELEVANT DOCKET ENTRIES

State of Vermont vs. Rick Cox
District Court of Vermont, Unit II, Chittenden Circuit
Docket No. 3044-8-83 CnCr

Date	Proceeding
8/14/83	Probable Cause found on original felony charges;
9/16/83	Not Guilty Pleas entered at arraignment;
12/06/83	Motion to Amend Information filed by State of Vermont;
12/09/83	Motion to Amend Information granted; Charges reduced to misdemeanors; Nolo contendere pleas tendered; Adjudication of Guilty entered; Presentence report ordered;
1/25/84	Defendant sentenced to 3 consecutive jail terms of 6 mos.-12 mos. for each count;
2/22/84	Notice of Appeal filed.
	Vermont Supreme Court Docket No. 84-105
9/17/85	Oral argument before Full Court following filing of briefs;
10/10/86	Entry order and opinion filed: "Sentence vacated. The PSI report is to be stricken from the file; case remanded for preparation of a new PSI report and resentencing before a trial judge who has not reviewed the stricken presentence report.";
10/24/86	Motion to reargue filed by State of Vermont;
11/03/86	Motion to reargue denied;
11/10/86	File returned to trial court.

STATE OF VERMONT
DISTRICT COURT OF VERMONT
UNIT II, CHITTENDEN CIRCUIT

Docket No. 3044-8-83 CnCr

STATE OF VERMONT

v.

RICK COX

INFORMATION BY STATE'S ATTORNEY

BY THE AUTHORITY OF THE STATE OF VERMONT,

State's Attorney for said County, upon his oath of office, charges:

That RICK COX of unknown in the county of unknown at Burlington in the County of Chittenden and in said Territorial Unit on the 14th day of August, 1983

WAS THEN AND THERE A PERSON WHO, WITHOUT LEGAL AUTHORITY, FORCIBLY CONFINED ANOTHER PERSON WITHIN THIS STATE, AGAINST HIS WILL, TO WIT: JOHN WILLIAMS, HEIDI HILDEBRANTT, AND MARC DAGOSTINO

PENALTY: Imprisonment of not more than 25 years, or fine of not more than $10,000.00, or both.

In violation of Title 13 V.S.A. § 2401

and against the peace and dignity of the State.

/s/ Susan Fowler
State's Attorney

Dated: 08-14-83

This information has been presented to me and I have found probable cause, this 14th day of August, 1983

/s/ Edward J. Cashman
District Judge

STATE OF VERMONT
DISTRICT OF VERMONT
UNIT II, CHITTENDEN CIRCUIT

(Title Omitted in Printing)

STATE OF VERMONT)
) ss.
COUNTY OF CHITTENDEN)

AFFIDAVIT OF PROBABLE CAUSE FOR ARREST

Now comes Cpl. Jay J. Morris, affiant, being duly
(Officer)
sworn and on oath deposes and says he has probable cause to believe that Rick Cox has committed the crime
(respondent)
of Kidnapping, in violation of T 13 V.S.A. 2401

(A) On 08-14-83 at approximately 0611 hours, affiant was detailed to investigate a reported kidnapping.

(B) Affiant met with the victim, John Williams, who related that a male had been in his (Williams') vehicle along with two other friends. At approximately 0245 hours, while Williams was driving the vehicle east on Flynn Avenue near Pine Street in Burlington, the male, known only as Rick, removed a 9mm pistol from the rear of the vehicle, loaded same, and pointed the barrel at one of the occupants, Heidi Hildebrantt.

(C) The male had just prior been arguing with Williams over a debt, and stated "Give me the money, or I'm going to shoot her first". He cocked the pistol.

(D) The male then pulled Williams' head back by the hair, and stuck the pistol barrel into Williams' throat. Williams asked the male if the two could settle the matter alone, allowing the other two passengers to leave, and he replied in the negative.

(E) Williams indicated that Hildebrantt was pleading to be allowed to leave, and the male responded that if anyone in the vehicle tried to leave the vehicle, they would be shot.

(F) Williams indicated that he also wanted to leave the vehicle, but was threatened with being shot if he attempted to do so.

(G) The male continued his threats and demands for a period thought in excess of two hours, the entire time against their desires to leave.

(H) Williams advised that the last name of the subject was unknown, but that he knew that the subject had been living at the Mapleleaf Motel on Shelburne Road in South Burlington in room #9. He further related that the subject's girlfriend and roommate was Nancy Champagne, a person known to him personally.

(I) A check with the South Burlington Police revealed that Champagne had been staying in the aforesaid room with a Rick Cox. They had been called by Champagne to investigate a "domestic complaint" involving Cox and Champagne on 08-12-83.

(J) A check with the Vermont State Police revealed that Champagne had filed a complaint with them against Cox earlier in the week. She had advised at that time, that Cox was her roommate at the aforesaid room.

(K) Cox, the Respondent, fits the physical description given by Williams, Hildebrantt, and the other

passenger, Marc Dagostino, as compared with the description given by the police officers that met with Cox days prior.

(L) Both Hilderbrantt and Dagostino told affiant that they were held against their will, and felt that had they tried to leave, they would have been harmed by Cox.

(Affiant) /s/ Cpl. Jay J. Morris

Subscribed and sworn to before me on 08-14-83, at Burlington, VT

/s/ [Illegible]
Notary Public

STATE OF VERMONT
DISTRICT COURT OF VERMONT
UNIT II, CHITTENDEN CIRCUIT

(Title Omitted in Printing)

STATE OF VERMONT

v.

RICHARD COX

MOTION TO AMEND INFORMATION

NOW COMES the State of Vermont through its Deputy State's Attorney and moves to amend the information on the above-captioned case. • • •

The amended information would allege three counts, as follows:

COUNT I:

Was then and there a person who, without legal authority, attempted by physical menace to place another in fear of death or serious bodily injury, to wit: John Williams, in violation of Title 13 V.S.A. § 1023(a)(3).

PENALTY: 1 year or $1,000.

COUNT II:

Was then and there a person who, without legal authority, attempted by physical menace to

place another in fear of death or serious bodily injury, to wit: Heidi Hildebrandt, in violation of Title 13 V.S.A. § 1023.

PENALTY: 1 year or $1,000

COUNT III:

Was then and there a person who, without legal authority, attempted to place another in fear of death or serious bodily injury, to wit: Marc Dagostino, in violation of 13 V.S.A. § 1023(a)(3).

PENALTY: 1 year or $1,000.

The State respectfully requests this amendment because the strength of the kidnapping charge on each individual varies and must stand or fall on its own merit. This information was not known by the State until depositions of the victims were held on December 3, 1983.

DATED this 6th day of December, 1983.

Respectfully submitted,

/s/ Susan Fowler
SUSAN L. FOWLER
Chief Deputy State's Attorney

cc: Public Defender

STATE OF VERMONT
DISTRICT COURT OF VERMONT
UNIT III, CHITTENDEN CIRCUIT

(Title Omitted in Printing)

STATE OF VERMONT

vs.

RICHARD COX

SENTENCING

January 25, 1984

Before: HONORABLE PAUL F. HUDSON

APPEARANCES:

Susan Fowler, Deputy State's Attorney, on behalf of the State of Vermont.

Jane Watson, Chittenden County Public Defender, on behalf of the Defendant.

Diana Agnew, Chittenden County Public Defender, on behalf of the Defendant.

JANE WORTHEN-SMITH, RPR, CM
Official Court Reporter
Vermont District Court
39 Pearl Street
Burlington, Vermont

[2] THE COURT: The matter before the Court is State of Vermont versus Richard Cox. This case is on Docket 3344-8-83 [*sic*]. Mr. Cox is before the Court this afternoon with his attorney, Jane Watson and Diana Agnew. State's represented by Miss Fowler; and the matter is here for sentencing on three counts of simple assault.

The Court has received a presentence report authorized by Diane Farley. Court also notes a letter of objection to the report filed by Miss Watson on today's date. Miss Watson, the Court will hear you with regard to the objections that you raise as to the report and we'll then hear a response from the Deputy State's Attorney.

MS. WATSON: Your Honor, as I indicated to you earlier, I didn't bring the Rule with me, and I was unable to find a copy in the Clerk's office. However, to the best of my recollection, the Rule makes provision for the Defendant to meet any objection that he has. And perhaps the Rule does not call for exactly what the possibilities are for the presentence investigation report to be rewritten, but I think the spirit of the Rule indicates that there is certainly space for additional time and opportunity to point out any objections or shortcomings of the presentence investigation report.

THE COURT: Oksy [*sic*]. Do so now.

[3] MS. WATSON: I would like to make a letter that I submitted today a part of the record by virtue of incorporating it into this hearing. We object to the presentence investigation report for numerous reasons.

We have listed in detail those part of the report which we believe are violations under *State versus Williams.* In addition to that, we believe that were those stricken that would be left of the report would be very misleading to a judge who would view it with the many gaps it would have. And in addition, that the overall tone of the report is objectionable.

The power of the written word is a fairly awesome power, and updoing [*sic*] the kind of bias that has been

presented in the presentence investigation report we believe is nearly impossible to do. I will address those portions that we think are *Williams* at the end. But aside from that, we would point out that the offense summary and the victim's version have been lifted from a police report. It is interesting to us that the only victim who is quoted in this—there were allegedly three victims. We deposed two of the three victims, and the only one who is quoted in this report is the one who failed to respond to subponea for deposition. The other two were subpoenaed, appeared, and the depositions [4] are available for those two people. In addition, we know that those two people —how those two people feel about the sentencing, because as the Court can see, we have attached affidavits from them. Beyond that we know that at least one of them is Miss Hildabrand, was in fact contacted by the probation officer and that fact or any result of a conversation is not included in the presentence investigation.

THE COURT: You may call this afternoon if that's what you decide to present to the Court.

MS. WATSON: We think it's interesting that the one victim's version is without any personal interview. It is verbatim what we have presented in the police report without the opportunity to depose this person. In addition to that, with respect to employment, we have contacted personally ourselves the employer and it is our understanding from him that at the time he was contacted by the Probation Department he could not remember Rick Cox and subsequently discussed it with his present employees, and then did remember Rick Cox and made certain statements about Mr. Cox to us so that what stands in the presentence investigation report indicates that our client was not truthful about former employment when in fact he was; and the employer now recollects that and would in fact have a statement to make [5] about what he remembers and the nature of that employment. So it is inadequate in that way.

THE COURT: That's not necessarily Miss Farley's fault that the employer suffered from a bad memory, but I will accept as a matter of correction that he does not recall Mr. Cox being in his employment. Do I gather that was a successful employment?

MS. WATSON: As far as we can tell from his comments it was.

THE COURT: Good. Okay.

MS. WATSON: With respect to the *Williams* material, those are listed at Page 2 under "Defendant's Version," the second paragraph; the second and fourth sentences contain allegations of criminal activity that have not been proven.

Paragraph Five, the third and fourth sentences do the same. At Page 3, still "Defendant's Version," the second paragraph and the second sentence indicates the same thing. Paragraph 7 of the entire paragraph and Paragraph 9 under "Defendant's Version," are such that to what exactly would constitute unproven crime, the whole paragraph would have to come out.

Page 5 under "Law Enforcement Official's Statement," again the reference to criminal conduct not proven.

[6] THE COURT: Rest assured on the officer's official statement, Miss Watson, that that is excluded. It's hearsay. It's speculation, and I won't consider it anyway.

MS. WATSON: Is that with respect to both paragraphs?

THE COURT: You bet.

MS. WATSON: On Page 6 under "Other Convictions," the first, second, third, and fourth paragraphs include things which are not convictions to our knowledge.

THE COURT: Let me just address at this point to Miss Farley. You have listed, Miss Farley, convictions March '73, December '74, January and April '77. Are those simple arrest records or are those all convictions with the penalty that was imposed?

MS. FARLEY: The offenses that are listed are actual convictions. It's an incomplete record, and the offenses listed above that's what I received from—no date, no convictions. That has not been completed as to this day.

THE COURT: You don't have any simple arrest record, information, it's all conviction data?

MS. FARLEY: The ones that are listed are the ones that are verified convictions.

[7] THE COURT: Do I gather Missouri for common assault, April' 77, there is no disposition other than guilty plea?

MS. FARLEY: Right. There was a guilty plea entered on the record.

THE COURT: So essentially that's a case pending since?

MS. FARLEY: I don't know if you assume that, but—

THE COURT: Okay, thank you. You may proceed, Miss Watson.

MS. WATSON: So my understanding is that the only things that are verified convictions are the things that appear under the heading, "Date, Source, Offense and Disposition"? Is that your understanding from what Miss Farley said?

THE COURT: That's my understanding that those are all for conviction record, not arrest record which are prohibited by standard 2.5 of the ABA standards in sentencing; and are, by the way, very much part of *Williams* decision.

MS. WATSON: So that the material in the first four paragraphs would be subject to deletion?

THE COURT: No. Be probably included in this report.

[8] MS. WATSON: Those things listed in the second paragraph are not verified convictions.

THE COURT: I understand they are.

MS. WATSON: We have no way of knowing.

THE COURT: Miss Farley? Is that from a conviction?

MS. FARLEY: Your Honor, it may clarify matters to tell you what I have available to me. This is what is in the record. I received a record check from Missouri which I have in which this paragraph is deleted from the actual form. I rewrote to them asking for confirmation whether these were arrests or convictions. To my knowledge I don't know which ones were arrests or convictions except for the ones that are listed that was confirmed via FBI report.

THE COURT: Okay. So that is conviction data. Proceed, Miss Watson.

MS. WATSON: Well, your Honor, my understanding of what she said was that those offenses listed in the second paragraph are not verified convictions.

THE COURT: Proceed.

MS. WATSON: In addition to that one of the ones that is listed as a verified conviction is one which after completion of probation found to us from our client to be something akin to our deferred [9] sentence here so that the completion of the probation should have brought about the expungement of a conviction. which would be the one dated the 12-16-74.

THE COURT: We won't consider that. Anything further with the paragraphs that you set forth in your letter of objection, Ms. Watson?

MS. WATSON: At Page 8F which is "Alcohol and Drug Usage," the fifth paragraph beginning in its entirety refers to criminal conduct not proven. Page 8 under "Leisure Activities," I would believe that both of those paragraphs should be stricken because they are surmise and gossip with no substantiation. As a matter of fact, our client tells us that the Probation Officer called him after her visit and asked him specifically if he was associated with the motorcycle group, and he told her, no, he was not.

THE COURT: I have deleted that myself, Miss Watson. I don't know that that type of relationship bears directly on sentencing, and I have already deleted it myself from further consideration. Okay?

MS. WATSON: At Page 9, Roman numeral V "Assessment and Recommendation, paragraph 2, the second sentence contains allegations of criminal conduct not proven. Page 10, still "Assessment and Recommendation," fifth paragraph under that heading—not on the page but the fifth [10] paragraph under that heading, the second sentence and the entire paragraph, sixth paragraph, seventh paragraph and ninth paragraph includes again reference which relates back to all of the other parts of the presentence that we believe are objectionable under *Williams*.

In addition to taht [*sic*] I might tell the Court that when the Probation Officer came to interview our client we in fact arranged for our investigator to go down and talk with him to prepare him for what would be coming forward, and he indicated to the Probation Officer that he really didn't want to talk to her until Paul Kelley was there, who is the investigator on the case. And she indicated to him that that was fine but she wouldn't come back again. And made him feel as though he would have no opportunity to consult with us before talking with her. So that much of the material which has been included in violation of *Williams* are things that our client would have been advised about had he had an opportunity to speak with us first.

And I would also note that attached beside the affidavit is a letter from a man in the Corrections of St. Louis County who is quoted in the presentence investigation, and I think if you just are overall objection to the nature of this report and the necessity for having it prepared so that it is an unbiased [11] document is shown with reflection to the difference between the man's own letter which has not been added in any way and what has been placed in the presentence investigation

report. The letter is a good deal more positive than the quotation of his comments by the Probation Officer. So I guess the long and the short of it is that we think that there is material that is clearly objectionable under *Williams*; and that the nature of the entire thing is such that that Mr. Cox cannot have a fair sentencing on this presentence investigation report. And as my letter points out, this is something that I personally have rarely requested in six years or so that I practiced in this court, I have only once before that I can recall requested this, and I think that again I'm in a position where my client's best interests it's necessary to do.

THE COURT: Miss Fowler?

MS. FOWLER: Your Honor, I have looked over the items that Jane had asked to have stricken as we went over them. Our position would be for the most part that with respect to pages 2 and 3 the "Defendant's Version," those are admissions as we would feel that those should not be stricken. The Court has already struck from the record Page 5, the law enforcement official's statement. The other conviction, while the Court indicates those may be included, we would have no objection to [12] striking that portion of the report which does not list disposition as well. That is the last, the six convictions which are listed out of date and sort and offense of disposition we feel there is absolutely nothing wrong with those. I believe we could include the rest, but we would have no objection to stricking that as well. The offenses include paragraph 1 to where it lists a string of offenses, of course, it's up to the Court, but that would be our position.

THE COURT: We'll excise that portion. [*sic*] and would only deal with the specific cases where there is a disposition that appears that Miss Farley's indicated was confirmed by Missouri and by FBI record check which is certainly sufficient verification.

MS. FOWLER: On Page 8, paragraph F those are admission once again. And in paragraph G the Court has already omitted the reference to the motorcycle gang.

THE COURT: All right.

MS. FOWLER: And the rest is basically either admissions or the opinion of the Probation Officer which is perfectly admissible in a presentence recommendation with respect to the comments on Page 10.

MS. WATSON: Your Honor, may I just say one other thing?

[13] THE COURT: No, I don't think so. I have heard enough, Miss Watson, and I appreciate your thoughts, but unless there is somethingnow [*sic*] that's been raised by Miss Fowler, let's not go over the same ground.

MS. WATSON: I'm not going to go over the same ground. I'm just going to state what I think amounts to or relates to legal issues; and that is that—and this does come up as to whether or not admission somehow gets by the *Williams* decision. And I think it's clear from our statements that we think they do not, and further, if in fact they do, then I think that it must be Constitutionally necessary for the probation officer who is preparing a PSI to inform as to [*sic*] police officers would tell a defendant his rights he is waiving and what trouble he might get himself into by being fully open and not remaining silent.

THE COURT: Don't you think that's a shared function with his attorney?

MS. WATSON: I don't understand what you mean by shared function.

THE COURT: A person that is represented by counsel who has been convicted of an offense, don't you think it's a shared function with the attorney to be prepared for a conversation with the probation and parole officer about the record?

[14] MS. WATSON: I think that's probably a wise thing for counsel to do. I don't think that it saves the objection or the Constitutional violation. In fact, in this case we attempted to do that and were short circuited.

THE COURT: Okay. The Court has with the time it had available researched the law in the area and con-

sidered your letter, Miss Watson, along with your arguments this afternoon and those of Miss Fowler insofar as with—specifically with reference in the presentence report. I don't think "Law Enforcement Official's Statement," in paragraph E helps much. It's more of an opinion than a statement of fact. I know probation and parole it's customary to contact the investigating officer and on occasion quite valuable material can come forward. I just don't happen to think that has much bearing. I have excluded the reference on Page 6 to certainly of the offenses that appear without disposition information. Balance I have already ruled as appropriate for the Court. Page 8 I excluded the reference to the Pagans. Court sees the balance of this report as being in compliance with *Williams*.

Williams was a case that was written in 1979 when the Supreme Court considered the manner in which John Williams was considered in leud [*sic*] and [15] and [*sic*] lascivious conduct charge, what is essentially conviction information. *Williams* decision is limited in its application to standard 2.3 of the American Bar Association's standard of probation. It is pretty much the basis of the *Williams* decision as this Court sees it. The prohibition of that ABA standard that our Court deems to have adopted is that in presenting a presentence report unproven allegations of arrest information cannot be included in the defendant's criminal record portion of the report. That was my dialogue with Miss Farley a few moments ago. I don't believe in its opinion in *Williams* that our Supreme Court was meant to limit certain other types of information that the Court could consider at sentencing that might include possibility of criminal conduct. I am referring now specifically to another Williams case which is *Williams versus New York*. This is at 337 U.S. 241, 1949 case where Williams was being sentenced for murder committed during the course of a burglary. The sentencing Court considered some 30 other burglaries that he had been involved in at the time he was sentenced.

In a very interesting opinion by Justice Black it was indicated to the Court that this information could not only be beneficial to the State, could be beneficial to the defendant because it permitted the Court to set a rational sentence, and there could be a reasonable sentencing plan established [16] when you're dealing with the whole individual rather than with some of the materials being hidden. That consideration, by the way, was under the Fourteenth Amendment of the Constitution. That type of thing is followed in *Greg versus United States*, 394 U.S. 489, 1969 case. It indicated there aren't formal limitations on a presentence report contents. They may rest on hearsay, and they may not necessarily have a bearing on the crimes which the Defendant was charged, broader information. It is followed as well as *U.S. v. Tucker*, 404 U.S. at 443, 1972 case.

As far as the information in this case is concerned, it is particularly germaine [*sic*] to what Mr. Cox is about when the Court considers what is in the report. Appears essentially to be reliable information because it's either information Miss Farley had or that the Defendant has given her. It's in the Court's assessment protected where it has satisfied the due process requirement and has satisfied the ABA standard. Als an opportunity in Rule 32 of the Criminal Rules to protest the report, to present oral testimony to the Court and present argument to the Court, to present any other type of information to the Court that's needed such as the letter I have received from the Defense today and I'm considering in this decision.

[16] [*sic*] With that in mind, with the exceptions noted that have been deleted, the balance of the letter treated as a motion to excise the report is denied.

Now, as far as the tone of the report is concerned, I don't particularly find it distressing. It's not an easy case to write about. Mr. Williams is a complex man. He has problems that other people have, just seems to have them in larger portions at certain times. I don't know

that the view of this matter as being biased presentence report is at all well taken. As a matter of fact, the Court does not agree with counsel's view of it. Court is not in counsel's position either. Going to deny the request insofar as it is asking for rewrite of the presentence report, because I think it satisfies the statute in the State of Vermont as to the preparation of the report; and it satisfies the Rules of Criminal Procedure.

With that in mind, are counsel prepared to proceed with sentencing?

MS. FOWLER: Yes, your Honor.

THE COURT: Okay, Miss Watson, are you prepared?

MS. WATSON: Yes. The recommendation, your Honor, that we're making for sentencing is essentially [17] the recommendation made by the two alleged victims here who were deposed, whom we got to see face to face, and who are willing to talk with us about what they thought was appropriate, they being in the most grave position to this incident. They feel the amount of time which Mr. Cox has already served, which is significant, comes to something like, something in the area of six months, is sufficient punishment from their standpoint.

I would also point out to the Court that the other letter which we have submitted from the Deputy Chief of Custody at the St. Louis County where Mr. Cox spent some time before indicates that—well, I think it's interesting that there were no institutional infractions and insofar as none are reported here in Chittenden County. In addition he was in this case released on his own recognizance, and apparently in this experience just did not display any bitterness toward the criminal justice system.

I also point out that since the Court is taking into consideration the material that we find objectionable with respect to drugs, that the Court should give serious consideration to the statement of Mr. Cox himself about

that. And I think he makes a pretty flat statement to the probation officer that he has really had it with that particular kind of lifestyle and [18] really wants not to be involved at all with drugs any more. That, in conjunction with the kind of attitude which has been observed by someone who has been in close association with him in corrections leads me to believe that he has the kind of attitude and certainly the intellectual ability, and he seems to have the intellectual ability in terms of conversations that I have had with him to be one who can take advantage of what we have available in terms of dealing with those kinds of problems. He also is in fact a person who has been able to maintain employment and while we already pointed out to the Court that the report is incorrect, that in fact he works as he said he did, in Florida before coming here and the report does include in his past before that employment. So while he has had some scrapes with the law throughout his life, it is clear that the use of drugs has probably been the major problem in terms of his conduct, because he seems to otherwise have all of the facilities that one needs to live a lawful life.

In addition, our cilent has been attending the AA meetings which are available at the Correctional Center while he has been detained there. So for all of those reasons we believe that what the victims suggest is a reasonable sentence and that Mr. Cox be sentenced to a sentence which in composite of the three [19] charges would amount to a six month minimum and a nine month to one year maximum with the balance of the sentence beyond for credit for time served be suspended with special condition for treatment.

THE COURT: Thank you. Mr. Cox, anything that you have to say in your own behalf?

THE DEFENDANT: No, sir.

THE COURT: Nothing? Miss Fowler?

MS. FOWLER: Your Honor, this is a complicated case as the Court may have gathered from reading the

presentence investigation. It was my case, and I was relatively involved with it from the beginning. It began as a kidnapping case. After speaking with the victims a number of times and having some contact with them, it was reduced down to the three counts of simple assault. As Jane indicated earlier while they were happy to speak with me on the phone they were relatively unwilling to get involved with respect to coming in for depositions. One of them failed to appear. The other two did come in and were deposed. It appears that some of this reluctance or hesitance comes from the nature of the entire incident, and that they just as soon forget it as quickly as possible. My feeling about it was that it was a frightening event. He held them essentially at gunpoint for over an hour in a car and they were undoubtedly [20] terrorized at that time. He has six prior convictions which the Court is considering and stated in his report to Miss Farley that in the last nine months he didn't remember not being high on something.

It seems he is fairly well trenched in the habit of using drugs, and while he indicates that he seeks to get out of that type of lifestyle, I sincerely hope that it is true for his sake.

I would ask that he receive a sentence of essentially a year and a half; nine to twelve months to serve on the first simple assault; zero to six months to serve, consecutive, on the second simple assault; and zero to six months concurrent on the third. He does indicate he wants to leave the State as soon as he is released, and I believe that probation's feeling is that they would just as soon have him serve his time and then go on his way as opposed to stay here under the extended probation.

MS. WATSON: For the record, I think it's quite clear that I just want to make it a matter of record, that we do object to going to sentencing on the present report. And beyond that I would just point out that in the deposition of two people who did show up that they did not really indicate that they were terrorized. And

I think that's reflected in what they think is a [21] suitable sentence.

THE COURT: Well, Mr. Cox, if those three people in that car weren't terrorized, they were either immortal or foolish. Nine millimeter is a relatively deadly piece of equipment; and as we all know, that's the basis for the center part of the case.

Your report indicates that you have had a substantial amount of contact with drugs and drug abuse in the past. Whether or not your trip to Vermont was a travelling of a merchant, I don't know. From what some of the things you said that it may have been. This is not a beckoning country for that type of activity. I will conclude my statements in a minute. I certainly am optimistic in some respects from this report that you have decided to change your lifestyle with regard to illicit drugs; because that is part of the sentence, and I intend to recommend drug counseling as appropriate for you, because I do think that you can make progress.

You're a young man. You got an opportunity. You have prior convictions that have suggested to the Court that parole hasn't worked or probation hasn't worked in the past, but there again is an opportunity if you want to turn the corner. I can sit here and and impose any sentence that is within the statute, but it's up to you to decide that this is enough. You have gotten sick of [22] beating your head against the wall. The pain will stop when you quit. Okay? I'm concerned that there be a punishment in your case, because of what has occurred; and I think you probably came here today expecting that. At least you would have been less than candid with yourself if you didn't. I expect that rehabilitation will occur in your case, because that I expect will happen for anyone or at least should. I also expect that as a result of this case there will be some deterrence for you in the future for ever trying to commit this type of offense again, and I certainly hope the public gets the message.

For these three counts of simple assault, Mr. Cox, I commit you on the first count to the Commissioner of Corrections' custody for a term of not less than six, no more than twelve months. On the second count I commit you to a consecutive term of six to twelve months; and the third count I commit you to a consecutive term of six to twelve months.

Anything further counsel? There is credit awarded for time the Defendant has been held in custody.

MS. FOWLER: No, thank you, your Honor.

THE COURT: Okay, you're remanded to the Commissioner's custody.

(Certificate Omitted in Printing)

IN THE SUPREME COURT OF THE
STATE OF VERMONT

Supreme Court Docket No. 84-105

STATE OF VERMONT

v.

RICK COX

MOTION TO REARGUE

The State respectfully requests the Court, pursuant to V.R.A.P. 40, to reexamine its decision in the above-captioned cause. The State submits that the Court has misapplied the extent of the Fifth Amendment protections. The State further argues that, in light of the absence of any evidentiary record at the sentencing hearing, the case should be remanded to the lower court in order to permit testimony from, among others, the probation officer and the defendant concerning the interrogative procedures employed.

The law is well settled that the Fifth Amendment protections bar the use of incriminating responses in future criminal proceedings. See, for example, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) and *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976). The Appellee respectfully contends that under the facts of this record the privilege against self-incrimination does not apply to the sentencing stage of this prosecution. Reliance on *Estelle v. Smith*, 451 U.S. 454 (1981), is unavailing since any enhancement to sentencing here is radically different from that obtained in a capital case when the death penalty may be the ultimate outcome. Such enhancement does not come into play in a more typical criminal prosecution. For example, see *Baumann v. U.S.*, 692 F.2d 565, 576 (9th Cir. 1982).

> We conclude that there is a substantial difference between a psychiatric examination of the defendant in a capital case which seeks to elicit evidence from the defendant relating to the critical aggravating factor of dangerousness, and a "routine" presentence interview, see *Estelle*, supra, 451 U.S. at 465, 101 S. Ct. at 1874, restricted to gathering information upon which the District Court, in its discretion, may rely when imposing sentence.

Baumann v. U.S. at 576.

That Court appropriately observed the narrow reach of the *Estelle* decision regarding the High Court's interpretation of the Fifth Amendment in a death penalty case. Specifically, see, *Estelle v. Smith*, at 469 n. 13 ("Of course, we do not hold that the same Fifth Amendment concerns are necessarily present by all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination.")

Should the Court find the privilege against self-incrimination applicable to the sentencing phase of this cause, the record insufficiently demonstrates the extent, if any, of pressures exerted by the probation officer during the interview. Contrary to the record set forth in *Jones v. Cardwell*, 686 F.2d 754 (9th Cir. 1982), where the Court clearly found an imperative to cooperate and respond to questioning by the probation officer, as well as a showing of questions regarding the underlying crime as well as other additional criminal activity, in this case the record is devoid of any evidence regarding interrogative tactics employed by the probation officer. All that was asserted at the sentencing hearing was a belief on the part of defense counsel that the defendant wanted to speak with an investigator prior to participating in the presentence investigation interview. Given the probable scope of the questions discussed in the interview, i.e. employment history, family history and the like, the Court is without any guidance in terms of knowing what, if any, statements were made by the defendant on a volun-

tarily basis and what questions, if any, were posed by the probation officer.

In light of the defendant's right of allocution afforded under V.R.Cr.P. 32(a)(1)(C), the defendant lost nothing by a cessation of the interview process. Consequently the Court is in error when it implies that the defendant's sole opportunity to express himself was limited to the interview session conducted by the probation officer. See *State v. Cox*, Slip Op. 84-105 at p.5.

The Court is also directed to *Burch v. State*, 450 N.E. 2d 528 (Ind. 1983), a case relied on by this Court in this decision. While the Court referred to the *Burch* decision in part, it apparently overlooked that court's view that the presentence investigation interview did not involve apparently coercive pressures. The Appellee maintains that on this record there is no basis on which the Court can find such pressures confounded the Appellant and forced him to admit to other criminal activities.

Based on the foregoing, should the Court determine that the privilege against self-incrimination does apply to this proceeding, it is respectfully submitted that the Court must remand the cause in order to determine what occurred at the presentence investigation interview. Alternatively, a remand would be appropriate to ascertain to what extent, if any, the defendant's remarks played a part at sentencing.

Respectfully submitted,

Dated: October 24, 1986

STATE OF VERMONT

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